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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. K. C., Defendant and Appellant.	E059728 (Super.Ct.No. FELSS1301004) OPINION

APPEAL from the Superior Court of San Bernardino County. Elia V. Pirozzi, Judge. Dismissed.

Rudy Kraft, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Meagan J. Beale, Peter Quon, Jr., and Lise S. Jacobson, Deputy Attorneys General, for Plaintiff and Respondent.

I

INTRODUCTION

A jury found defendant K.C. qualified for civil commitment as a Mentally Disordered Offender (MDO). The court ordered defendant's commitment to a state hospital be extended for another year from May 28, 2013, to May 28, 2014. (Pen. Code, § 2970 et seq.)[1] On appeal, defendant contends his equal protection and due process rights were violated because he was compelled to testify at trial and he was not administered the psychotropic medication he needs, causing him to decompensate during the trial. Furthermore, the trial court did not instruct the jury properly about whether defendant would take his medication when released. Additionally, defendant contends substantial evidence does not support the jury's verdict because both experts agreed he should be released from commitment.[2]

After this appeal was filed in September 2013, defendant's one-year commitment expired in May 2014 and was not extended. Therefore, according to both his appellate counsel and the Attorney General, defendant has been released and his involuntary treatment has been discontinued. If a ruling by this court can have no practical effect for defendant, his appeal is moot. (See *People v. J.S.* (2014) 229 Cal.App.4th 163, 170-171, 174.) [Fourth Dist., Div. Two].) Defendant argues the court should decide his appeal because it concerns issues which are frequently "recurring and present important

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[1] All statutory references are to the Penal Code.

[2] Defendant has waived the argument that trial counsel provided ineffective assistance of counsel.

questions of law." (*In re O.P.* (2012) 207 Cal.App.4th 924, 927.) We conclude the appeal is moot on all issues and dismiss.

II

FACTUAL AND PROCEDURAL BACKGROUND

In order to supply context for our decision we set forth a summary of the appellate record. Defendant's date of birth is June 1958. He was a patient at Atascadero State Hospital with a diagnosis of "schizoaffective disorder, bipolar type" or "schizophrenia, undifferentiated type." His maximum commitment date as an MDO was May 28, 2013. On March 12, 2013, the People filed a petition to extend defendant's commitment. Trial began on September 16, 2013.

A. Consolati's Testimony

Amy Consolati, a licensed social worker, testified she had known K.C. for several years. She became a member of defendant's treatment team and had daily interactions with him from March to September 2013. The primary focus of his treatment was psychiatric stability and reducing delusional beliefs and sexual aggression. He was also encouraged to learn to manage his medications independently and to develop coping skills, including abstaining from drugs and alcohol and developing a viable discharge plan.

Defendant's symptoms included paranoid delusions. His insight about his mental illness fluctuated. He consistently believed he was Lucifer and evil. In October 2012, he was evaluated as presenting a "substantial danger of physical harm to others by reason of severe mental disorder." He was still enrolled in sex offender treatment in August 2013.

His prescribed medication was Clozaril or clozapine[3] but Consolati did not observe that his symptoms had been reduced.

Defendant did not want to accept a conservatorship. No one, including his parents, was capable of supporting him if released. His eligibility for a conditional release program was questionable and he preferred an unconditional release.

B. Alfaro's Testimony

Laura Alfaro, a psychiatric technician, testified that her job was to administer medication to K.C. On July 18, 2013, when she was giving K.C. his regular medication, he approached her and said he was having inappropriate thoughts. She told him he should not act on them and he agreed and took his medication. Later he commented to her, "I see the way that you look at me. I know you didn't want me to leave the med window" and "Well, you're a tough cat to catch." She characterized his statements as flirting or having "sexual undertones" and she recorded the incident on his chart.

C. Defendant's Testimony

Defendant testified at trial that he was presently taking psychotropic medications—lithium, Novain, and clozapine. The latter caused some side effects. The parties stipulated that, as of September 12, 2013, he was not being given clozapine while he was in custody in jail during the trial.

Defendant explained his present criminal charges were for burglary, child annoyance, and failure to register. The incident with the child had occurred when

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[3] We will use the generic designation, clozapine.

defendant was watching a televised baseball game in the company of a 14-year-old girl. The burglary happened when a motel would not give him a refund of $80. When he was 19 years old he was charged with kidnapping and rape but found not guilty by reason of insanity. He has been institutionalized since 1978 and diagnosed as bipolar with schizophrenia. He said his diagnosis was based on his large vocabulary. He tried to explain his belief that people, or his roommate, would "dig" into his body, or his head, and exercise control by Astral projection to stop him from fighting. He denied masturbating openly. He acknowledged that he needs to take his medication. Much of defendant's testimony was unresponsive, incoherent, and rambling although he repeatedly denied hospital reports about his conduct while committed. Some of the confusion in his testimony seemed to have been caused by the prosecutor's complicated, compound, and repetitive style of questioning.

D. Dr. Perry's Testimony

Dr. Kevin Perry, a clinical psychologist, performed forensic evaluations on defendant in June 2010 and October 2012. Defendant had been repeatedly hospitalized and committed since 1978. Dr. Perry diagnosed defendant as "schizoaffective disorder, bipolar type" and "schizophrenia, undifferentiated type." Defendant's symptoms in the past included a history of delusions—calling himself Satan, Lucifer, or Beelzebub, and claiming the television and celebrities were sending him messages. Dr. Perry observed defendant's symptoms had improved recently. Although his testimony at trial was delusional, as is consistent with a psychotic disorder, Dr. Perry believed defendant's condition was exacerbated by the stress of testifying.

Dr. Perry testified defendant has a severe mental disorder, in remission for a year, with residual symptoms that could be controlled if released. In October 2012, Dr. Perry had concluded defendant could not be kept in remission without treatment but a year later defendant could be released even though some of defendant's testimony was delusional. Dr. Perry explained his opinion had changed since 2010 because, although defendant was not in remission in September 2011, he began taking clozapine in March 2012 and he improved in the seven months before the October 2012 evaluation. Therefore, defendant's symptoms had been controlled for a year and a half as of September 2013.

In spite of persistent challenges by the prosecutor, Dr. Perry reiterated that defendant was capable of independently managing his medication and psychiatric symptoms. Dr. Perry summarized his opinion: "[A]t this time, I don't think he's a substantial danger of physical harm because of his illness, because his symptoms have been controlled, and he's not been aggressive over the past two years. He's done well on his new medication regimen, so he . . . does not meet that standard [MDO], in my opinion."

E. Dr. Abrahamson's Testimony

Dr. Joseph Abrahamson testified that he was a staff psychiatrist who has known defendant since 2011 and he sees him daily. Dr. Abrahamson began prescribing clozapine for defendant in March 2012. Clozapine is an antipsychotic medication, predominantly for patients who have not responded to other therapies. Defendant experienced the side effect of elevated blood pressure levels but it was corrected.

Defendant did not experience the problem of "profound sedation." Defendant willingly complied with having his bowel movements checked for the side effect of constipation.

Defendant is psychotic with religious-based delusions, including the belief that he is the anti-Christ, Beelzebub, or Lucifer, and references to Armageddon. He also made racist comments about white people. Defendant had ongoing "low grade" problems with female staff members. Dr. Abrahamson was aware of the incident with Alfaro on July 18, 2013, in which defendant acted inappropriately. Defendant was apologetic and remorseful and did not behave inappropriately again. There was no disciplinary action. There were no other such incidents for more than a year since March 2012. Defendant's arguments with other patients and his comments about people "digging into his body" were made before he began taking clozapine.

Dr. Abrahamson did not agree that it was accurate to describe defendant as "floridly psychotic." Instead, he testified that defendant has complied with his treatment and voluntarily taken his medication, as well as being employed as a janitor with access to dangerous chemicals and items that could be used as weapons: "I think the real issue is can he function and do well in the treatment milieu with the level of symptomology that he continues to experience? And I think overwhelmingly he's demonstrated . . . that he can."

Dr. Abrahamson testified that defendant could decompensate if he had stopped getting clozapine on September 12, 2013. Without his medicine, defendant would revert. On May 2, 2013, defendant became more psychotic when he was not taking clozapine. However, in spite of his symptoms, defendant's mental illness was in remission. In

considering the three relevant criteria for an MDO, Dr. Abrahamson determined that defendant did represent a substantial danger of physical harm but he was in remission and could be kept in remission.

F. The Jury

During deliberations, the jury asked whether defendant was taking clozapine or a similar drug while in custody during the trial. The jury found defendant met the criteria of being an MDO.

III

MOOTNESS

"Commitment as an MDO is not indefinite; instead, '[a]n MDO is committed for . . . one-year period[s] and thereafter has the right to be released unless the People prove beyond a reasonable doubt that he or she should be recommitted for another year.' (*People v. McKee* (2010) 47 Cal.4th 1172, 1202.)" (*Lopez v. Superior Court* (2010) 50 Cal.4th 1055, 1061-1063.)

This court recently elaborated on mootness in the context of an MDO appeal: """The Mentally Disordered Offender Act (MDO Act), enacted in 1985, requires that offenders who have been convicted of violent crimes related to their mental disorders, and who continue to pose a danger to society, receive mental health treatment . . . until their mental disorder can be kept in remission. [Citation.]""" (*Lopez v. Superior Court* (2010) 50 Cal.4th 1055, 1061 (*Lopez*), disapproved on other grounds by *People v. Harrison* (2013) 57 Cal.4th 1211, 1230, fn. 2.)

"'The MDO Act provides for treatment of certified MDO's at three stages of commitment: as a condition of parole, in conjunction with the extension of parole, and following release from parole. Section 2962 governs the first of the three commitment phases, setting forth the six criteria necessary to establish MDO status; these criteria must be present at the time of the State Department of Mental Health's and Department of Correction and Rehabilitation's determination that an offender, as a condition of parole, must be treated by the State Department of Mental Health.'" (*Lopez, supra*, 50 Cal.4th at pp. 1061-1062.)

"Three of the six criteria to establish MDO status—that an offender suffers from a severe mental disorder, that the illness is not or cannot be kept in remission, and that the offender poses a risk of danger to others—are dynamic, in the sense of being 'capable of change over time, and must be established at each annual review of the commitment.' (*Lopez, supra*, 50 Cal.4th at p. 1062; see § 2962, subd. (a).) The other three—that the offender's severe mental disorder was a cause or aggravating factor in the commission of the underlying crime, that the offender was treated for at least 90 days preceding his or her release, and that the underlying crime was a violent crime as enumerated in section 2962, subdivision (e)—'are considered "static" or "foundational" factors in that they "concern past events that once established, are incapable of change."' (*Lopez, supra*, at p. 1062.) 'The practical effect of this distinction is that the three criteria concerning past events need only be proven once, while the BPT [(Board of Prison Terms)] must find that the parolee meets the other three criteria at the time of the annual hearing in order to

continue treatment for an additional year.' (*People v. Merfield* (2007) 147 Cal.App.4th 1071, 1075-1076.)" (*People v. J.S., supra,* 229 Cal.App.4th at pp. 169-170.)

On the issue of mootness, the J.S. court stated at page 170: "[A]s a general matter, an issue is moot if 'any ruling by [the] court can have no practical impact or provide the parties effectual relief.' (*Woodward Park Homeowners Assn. v. Garreks, Inc.* (2000) 77 Cal.App.4th 880, 888.)" J.S. recognized that the determination of whether an offender qualifies as an MDO may continue to have a practical effect when the People seek to extend an offender's involuntary treatment and the offender is subject to recertification. (*People v. J.S., supra,* 229 Cal.App.4th at pp. 171-172, citing *People v. Merfield, supra,* 147 Cal.App.4th at p. 1075 and *Lopez v. Superior Court, supra,* 50 Cal.4th at pp. 1055-1067.)

The commitment order appealed from has expired. In *People v. Cheek* (2001) 25 Cal.4th 894, 897-898, and *People v. Hurtado* (2002) 28 Cal.4th 1179, 1186, the California Supreme Court concluded that a proceeding in which a sexually violent predator seeks relief from a commitment order is rendered moot when the commitment term expires during the pendency of the appeal. The same principle holds true for appeals of commitment orders under the MDO Act (§ 2960 et seq.). It is the function of an appellate court to decide actual controversies by a judgment that can be carried into effect. It cannot render opinions on moot questions or declare principles of law that cannot affect the matter in issue in the case before it. When, during the pendency of an appeal an event occurs that renders it impossible for an appellate court to grant any effective relief, should it decide the case in favor of the appellant, the court will not

proceed to a formal judgment but will dismiss the appeal. (*City of Los Angeles v. County of Los Angeles* (1983) 147 Cal.App.3d 952, 958.)

When an appeal raises an issue that is likely to recur while evading appellate review and involves a matter of public interest, an appellate court may exercise its discretion to decide the issue for guidance in future proceedings before dismissing the appeal as moot. (*People v. Gregerson* (2011) 202 Cal.App.4th 306, 321.) In our view, the issues identified by defendant do not merit our exercise of discretion. Defendant argues he was compelled to testify without medication and the jury was not properly instructed about whether defendant would take his medication when released. Additionally, defendant contends substantial evidence does not support the jury's verdict because a psychologist and psychiatrist agreed he should be released from commitment.

All of defendant's proposed issues on appeal concern a particular defendant with specific problems related to his medication and treatment. Two medical experts testified that defendant should not be committed because his symptoms could be controlled by medication and he would take his medication if released. Two other medical staff testified differently. When defendant testified without the benefit of his medication, he displayed significant psychotic symptoms. Ultimately, the jury was persuaded that defendant should be recommitted. But the issues raised by defendant are factually dependent and do not qualify as issues of broad public interest—even if the public is narrowly defined as MDOs who oppose commitment.

IV

DISPOSITION

We cannot grant any effective relief to defendant, even if the evidence presented during the hearing that resulted in his recommitment between May 2013 and May 2014 was insufficient, because of the expiration of the appealed-from commitment order. Defendant's contentions invoke no appellate relief other than reversal of the expired commitment order. Accordingly, we dismiss the appeal as moot without reaching the merits of the appeal.

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CODRINGTON
J.

We concur:

RAMIREZ
P. J.

HOLLENHORST
J.